SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 258

THE BALTIMORE AND OHIO RAILROAD COMPANY, BOSTON AND MAINE RAILROAD, ERIE RAILROAD COMPANY, ET AL., *Appellants*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

ROBERT H. BIERMA,
H. D. BOYNTON,
T. O. BOOKER,
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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

Civil Action No. 8465(3)

THE BALTIMORE AND OHIO RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; ERIE RAILROAD COMPANY; GUY A. THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY, SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY, AND SAN BENITO AND RIO GRANDE VALLEY RAILWAY COMPANY; THE NEW YORK CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS; TEXAS AND NEW ORLEANS RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; WABASH RAILROAD COMPANY, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant,

AND

INTERSTATE COMMERCE COMMISSION AND TEXAS CITRUS & VEGETABLE GROWERS AND SHIPPERS,

Intervening Defendants

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL

(Filed July 3, 1952)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiffs, The Baltimore and

Ohio Railroad Company, et al., having presented this day their petition for appeal, now file this their statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and order of the United States District Court entered herein on June 18, 1952.

Nature of the Case under the Ruling of the District Court

This action was brought by plaintiffs, who are common carriers by railroad, to set aside, annul, suspend and enjoin an order of the Interstate Commerce Commission entered on the seventh day of January, A. D. 1952, in proceedings known as *Texas Citrus and Vegetable Growers and Shippers v. Atchison, T. & S. F. Ry. Co. et al.*, No. 30074 on said Commission's docket. Proceeding before the Commission was instituted by a complaint filed by Texas Citrus and Vegetable Growers and Shippers against designated railroads of the United States which participate in the transportation of vegetables from Texas to other states, alleging that the rates for said transportation were unreasonable, unduly preferential of vegetable growers and shippers in Arizona, California and New Mexico, and unduly prejudicial of vegetable growers and shippers in Texas. Said Commission found that the allegation of undue preference and prejudice had not been sustained, but found that existing rates on certain vegetables from Texas to specified destinations in other states were, and for the future would be, unreasonable to the extent they exceed rates computed at certain percentages of a described class rate scale. The Commission entered an order on the 21st day of December, A. D. 1950, requiring the defendants in the proceeding, including each of the plaintiffs here, to cease and desist on or before April 7, 1951, from publishing, demanding or collecting rates which would exceed those prescribed for

future application and requiring the defendants to establish on or before April 7, 1951, and thereafter to maintain rates which would not exceed those found to be reasonable by said Commission.

On March 16, 1951, certain rail carriers, including plaintiffs here, filed a petition with said Commission setting forth their claim that said order of December 21, 1950, would confiscate the properties of all and each of them contrary to the Fifth Amendment to the Constitution of the United States and requesting a further hearing for the petitioning carriers to introduce evidence in proof of their claim. By order dated August 1, 1951, said Commission denied the petition for further hearing, thus refusing to afford the petitioning carriers an opportunity to present evidence of confiscation. However, the proceeding was reopened by the order of August 1, 1951, for reconsideration on the record as made.

On January 7, 1952, said Commission, five Commissioners dissenting and stating that the rates prescribed were too low, issued its further report and order upon reconsideration. The report of January 7, 1952, found that the existing rates on certain vegetables from Texas to specified destinations in other states were and for the future would be unreasonable to the extent they exceed rates computed on distance scales of rates set forth in an appendix to the report and increased by general increases authorized in *Increased Freight Rates, 1951* (Ex Parte 175), a general revenue proceeding. The order of January 7, 1952, ordered the defendants before the Commission, including the plaintiffs here, to cease and desist from publishing, demanding, or collecting rates which would exceed the maximum of reasonableness found in the report and to publish, maintain and apply for future transportation rates which would not exceed said maximum of reasonableness.

By petition dated February 15, 1952, certain rail carriers, including plaintiffs here, set forth their claim that the order of January 7, 1952, would confiscate the property of the petitioning carriers and each of them and offered to introduce evidence in proof of the claim if said Commission would grant a further hearing therefor. The petition was denied by an order dated March 7, 1952.

Believing said Commission had exceeded its powers in issuing the order of January 7, 1952, and that the rates prescribed by said order would confiscate the property of the rail carriers affected and each of them, plaintiffs filed their complaint against the United States of America to enjoin, set aside, annul, and suspend said order. Plaintiffs requested that a three-judge court be convened to hear their complaint and evidence of confiscation which said Commission refused to hear. The Interstate Commerce Commission and Texas Citrus and Vegetable Growers and Shippers intervened as parties defendant.

Motions to dismiss the complaint were filed by (a) United States and Interstate Commerce Commission and (b) Texas Citrus & Vegetable Growers and Shippers. Plaintiffs filed a motion to stay the proceedings before the three-judge court and to remand the case to said Commission for the administrative determination of the cost of service for which the rates were prescribed. In a judgment and order filed June 18, 1952, a copy of which is appended hereto, the specially constituted District Court overruled plaintiff's motion to stay and remand, sustained defendants' motions to dismiss, and dismissed the cause.

Statutes Conferring Jurisdiction

The judgment and order here appealed from was entered in the District Court of the United States for the Eastern

District of Missouri, Eastern Division, by a statutory court consisting of one Circuit and two District judges specially convoked to hear and determine the complaint herein to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission, pursuant to and by virtue of Sections 1336, 2321-2325 and 2284 of Title 28, U. S. Code, 62 Statutes 931, 969-970 and 968, and Section 1009 of Title 5, U. S. Code, 60 Statutes 243.

Jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment and order of the District Court entered in this case is conferred by 1253 and 2101(b) of Title 28, U. S. Code, 62 Statutes 928 and 962.

Cases Sustaining Jurisdiction

United States v. *B. & O. R. Co.*, 333 U. S. 169; *New York* v. *United States*, 331 U. S. 284; *U. S.* v. *Hancock Truck Lines*, 324 U. S. 774; *B. & O. R. Co.* v. *United States*, 298 U. S. 349.

Statutes Involved

This appeal involves the validity of an order of the Interstate Commerce Commission entered on January 7, 1952, requiring plaintiffs here, among others, to cease and desist from publishing, demanding, or collecting rates in excess of those found to be a maximum of reasonableness and requiring plaintiffs here, among others, to establish and thereafter to maintain rates not in excess of those found to be a maximum of reasonableness. The order covers the rates on certain vegetables originating in Texas and transported by rail to destinations in certain other states of the United States, and was entered pursuant to the purported power under paragraph 1 of Section 15 of the Interstate Commerce Act, Sec. 15(1) of Title 49, U. S. Code, 41

Statutes 484-5, 48 Statutes 1102, 49 Statutes 543, 54 Statutes 911, which reads as follows:

> "That whenever, after full hearing, upon a complaint made as provided in Section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

The Interstate Commerce Commission found existing rates to be unlawful under paragraph 5 of Section 1 of the

Interstate Commerce Act, Section 1, paragraph 5 of Title 49, United States Code, 54 Statutes 900, 63 Statutes 485, which reads as follows:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

The validity of said order of the Interstate Commerce Commission is attacked under the Fifth Amendment of the Constitution of the United States, which is as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Date of Judgment or Decree Sought to Be Reviewed and Date upon Which Application for Appeal Is Presented

The judgment and order sought to be reviewed was entered on the 18th day of June, A. D. 1952, by the District Court of Missouri, Eastern Division. The application for appeal was presented on the 3rd day of July, A. D. 1952.

The Questions Involved Are Substantial

The questions involved in this appeal are substantial. The judgment and order of the District Court dated June 18, 1952, in effect reverses long standing precedent, and if

allowed to stand, will cause a violation of plaintiffs' constitutional rights and ultimately effect important changes in procedure before the Interstate Commerce Commission and other regulatory bodies.

For many years, it has been established that parties can protect their constitutional rights against confiscation of their properties by timely asserting such a claim before the regulatory body in a petition for rehearing after the order of the regulatory body is entered. It has been held that parties, such as these plaintiffs, "were not bound in advance of the Commission's findings and report to set up a fear of transgression of their constitutional rights. Presumably, the Commission would keep within the law". *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 370. Stated otherwise, if the constitutional issue was properly raised in a petition for rehearing, these plaintiffs are entitled as a matter of right to a hearing on the constitutional issue, and a judicial determination of it. See also *Lang Transp. Corporation* v. *United States,* 75 F. Supp. 915, 922 (footnote 5), where the principle is clearly stated and supported by numerous citations of authority of the Supreme Court.

This court in its judgment and order of June 18, 1952, does not follow this precedent but launches plaintiffs and all other parties who might be situated in similar circumstances into a new uncharted field. The court holds that railroads such as these plaintiffs, in every case before the Commission, must offer all evidence, including cost evidence, of confiscation, if they are to protect their constitutional rights against confiscation. If such is not done, plaintiffs, according to this court, lose all rights to a judicial determination of the constitutional issue. The very statement of the principle indicates the changes—far-reaching in their effect—which would be worked in Commission procedure.

The District Court cites five opinions of the Supreme Court in support of its order to dismiss the complaint.

Three of these cases are distinguishable from the instant case. The other two cases cited support plaintiffs' position that the motion to dismiss should be denied and that the cause should have been remanded to the Interstate Commerce Commission for an administrative determination of railroad costs of operation.

What should have been the key to the Court's action was *B. & O. R. Co.* v. *United States*, 298 U. S. 349, and *New York* v. *United States*, 331 U. S. 284. The former case is distinguished by the Court from the instant situation by the statement that it involved divisions and "is not in point in this proceeding." What the court ignored was the fact that the *New York case*, which refers expressly to the *B. & O. case*, is to the same effect as the *B. & O. case* and that the *New York case* involves only rates and not divisions in the same manner as the instant case. If the *New York case* which is cited with approval in the court's opinion had been followed, this cause would have been remanded to the Commission for a determination of costs as prayed for in plaintiffs' motion to stay and remand. Thereafter, the Court would have held a hearing to determine finally the constitutional issue. This same *New York case* is cited with approval again in *Alabama Public Service Commission* v. *Southern Railway Company*, 341 U. S. 351, 348, another case upon which the opinion of the court relies. Moreover, *Manufacturers R. Co.* v. *United States*, 246 U. S. 284, another case relied upon by the court is cited and distinguished in both the *B. & O. case* and the *New York case*. The only other case cited in the opinion of the Court is *United States* v. *Capital Transit Company*, 338 U. S. 286, which case is not in point since the issue of confiscation was never raised before the Commission by a petition for rehearing or otherwise.

The issue here is confiscation. There is a sharp distinction between the "ordinary cases" referred to in the

Manufacturers Railroad case, and such a confiscation case. The basis to the difference is illustrated by the following taken from the *Baltimore & Ohio case* at page 364:

> "There is a wide and fundamental difference between the question whether the commission, in prescribing divisions found by it to be just, reasonable and equitable, complied with the procedural requirements of the Act, and whether, if enforced against objecting carriers, the order will confiscate their property. The commission's findings of fact in the field first mentioned, if based on evidence, are conclusive. But, upon the question whether prescribed divisions constitute just compensation within the meaning of the Fifth Amendment, Congress is without power conclusively to bind the carriers. As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment.

This fundamental difference between "ordinary cases" and a confiscation case was clearly recognized in *Lang Transp. Corporation* v. *United States*, 75 F. Supp. 915, 922 (footnote 5), where the court stated:

> "Suits under the Urgent Deficiencies Act to set aside orders of the Interstate Commerce Commission are proceedings for judicial review upon the record before the Commission and are not trials de novo; hence evidence aliunde or dehors the record is inadmissible in the Federal District Court. *United States* v. *Louisville & Nashville R. Co.*, 1914, 235 U. S. 314, 35 S. Ct. 113, 59 L. Ed. 245; *Tagg Brothers & Moorehead* v. *United States*, 1930, 280 U. S. 420, 443-5, 50 S. Ct. 220, 74 L. Ed. 524; *Acker* v. *United States, 1936*, 298 U. S. 426, 434, 56 S. Ct. 824, 80 L. Ed. 1257; *National Broadcasting Co.* v. *United States*, 1943, 319 U. S. 190, 227, 63 S. Ct. 997, 87 L. Ed. 1344. There is an exception to

this rule where a claim of confiscation is made in a rate case; but even there correct practice requires that the evidence should be submitted in the first instance to the Commission. *Manufacturer's Railway Co.* v. *United States, 1918,* 246 U. S. 457, 489, 490, 38 S. Ct. 383, 62 L. Ed. 831; *St. Joseph Stockyards Co.* v. *United States, 1936,* 298 U. S. 38, 51-52, 56 S. Ct. 720, 80 L. Ed. 1033; *Baltimore & Ohio R. Co.* v. *United States,* 1936, 298 U. S. 349, 363, 369, 56 S. Ct. 797, 80 L. Ed. 1209."

The question which are here involved have previously been decided by the Supreme Court and we believe that this court has by its judgment and order erroneously departed from this long standing precedent. The questions presented are of great importance to the railroad industry and the public. Not only are the pecuniary interests of these plaintiffs seriously and adversely affected but long standing and previously established procedural practices could be disrupted by the court's judgment and order. Accordingly, it is submitted that substantial questions are involved which call for appropriate exercise of appellate jurisdiction.

Respectfully submitted,

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Attorneys for Plaintiffs.

Dated: July 3, 1952.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

Civil Action No. 8465 (3)

THE BALTIMORE AND OHIO RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; ERIE RAILROAD COMPANY; GUY A. THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY, SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY, AND SAN BENITO AND RIO GRANDE VALLEY RAILWAY COMPANY; THE NEW YORK CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS; TEXAS AND NEW ORLEANS RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; WABASH RAILROAD COMPANY, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant,

AND

INTERSTATE COMMERCE COMMISSION AND TEXAS CITRUS & VEGETABLE GROWERS AND SHIPPERS,

Intervening Defendants

APPEARANCES:

Richmond C. Coburn, Toll R. Ware, James B. Gray and Robert H. Bierma, Attorneys for Plaintiffs.

William V. O'Donnell, Asst. U. S. Atty., and Frank V. Vesper, Special Asst. Atty. General, Attorneys for United States.

A. Lee Pou, Attorney for Interstate Commerce Commission.

Frank A. Leffenwell and B. W. LaTourette, Attorneys for Texas Citrus & Vegetable Growers and Shippers.

Before THOMAS, Circuit Judge, MOORE and HARPER, District Judges.

HARPER, *Judge:*

APPENDIX "A"

Memorandum Opinion

This is a suit to enjoin, set aside, annul and suspend a certain order of the Interstate Commerce Commission, issued in a proceeding instituted by complaint of shippers under the Interstate Commerce Act, entitled "Texas Citrus and Vegetable Growers and Shippers vs. Atcheson, Topeka & Santa Fe Railway Company, et al., Docket #30,074." Sections 1336, 1398, 2284 and 2321-2325, Title 28, U.S.C., confer jurisdiction on this court in this matter.

The complaint before the Commission alleged that the rates and charges on fresh vegetables in carloads from origins in Texas to destinations in the United States other than Texas, were unreasonable, unduly prejudicial to vegetable growers and shippers in Texas, and unduly preferential of vegetable growers and shippers in Arizona, California and New Mexico. The complaint requested the Commission to prescribe rates for the future. The Commission by order of December 21, 1950, prescribed maximum rates on vegetables.

The carriers (plaintiffs here), on March 21, 1951, filed a petition for reconsideration and rehearing, and as the basis therefor claimed that the rates prescribed by the Commission were confiscatory, and if made effective would deprive them of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States, and sought opportunity to offer proof on this question. The Commission granted reconsideration on the record as made, but did not permit the submission of additional evidence. On January 7, 1952, the Commission issued its further report and order modifying the rates to some extent. On February 15, 1952, the carriers (plaintiffs here) again requested the Commission to grant a rehearing to afford the parties thereto an opportunity to offer proof in support of their averment that the rates prescribed in the order were confiscatory, which petition was denied by the Commission by its order dated March 7, 1952.

The plaintiffs brought this action seeking to restrain the enforcement of the order of the Commission dated January 7, 1952, and as grounds therefor allege that the refusal of the Commission to grant a rehearing as requested was and is arbitrary and capricious and an abuse of its discretion, contrary to the provisions of the Interstate Commerce Act and that the rates prescribed are confiscatory. The plaintiffs desire to present testimony before this court on that issue, but do not here contend that the rates are not just and reasonable based on the record.

The defendant, United States of America, and intervening defendants, Interstate Commerce Commission and Texas Citrus & Vegetable Growers and Shippers, have filed motions to dismiss. The plaintiffs have filed a motion to stay this cause, but with jurisdiction retained in the court, and to remand the cause to the Commission for the sole purpose of administrative determination by said Commission of the cost of transporting vegetables.

The question for the court is whether or not the plaintiffs have a right to a trial de novo at this stage of the proceedings on the question of confiscatory rates. One of the important elements in the determination of just and reasonable rates is cost of service, but the questions here is: When must such evidence be presented?

In dealing with the question of confiscatory rates the Supreme Court in *New York* v. *United States*, 331 U. S. 284, l. c. 335, said:

> "As stated in *Manufacturers R. Co.* v. *United States*, 246 U. S. 457, 489-490, and in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53-54, correct practice requires that, where the opportunity exists, all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance and should not be received by the District Court as though it were conducting a trial de novo."

In *United States* v. *Capital Transit Company*, 338 U. S. 286, l.c. 291, the Supreme Court said:

> "It is also argued here that the orders should be set aside because they are confiscatory. But the

record fails to show that this issue was properly presented to the Commission for its determination. Therefore the question of confiscation is not ripe for judicial review."

And in *Alabama Public Service Commission* v. *Southern Railway Company*, 341 U. S. 341, l.c. 348, the court said:

> "And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved."

In *New York* v. *United States, supra*, the District Court permitted the presentation of further evidence with respect to confiscation, but the Supreme Court said, l.c. 336:

> "Thus we think that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question."

In *Baltimore & Ohio Railroad Company* v. *United States*, 298 U. S. 349, testimony with respect to confiscation was permitted in the District Court and approved by the Supreme Court, but that case involved the division among carriers of the revenue resulting from admitted reasonable rates, and is not in point in this proceeding.

The complaint before the Commission dealt only with rates and the plaintiffs here were therefore on notice of the rates sought and were required to answer that complaint before the Commission. The plaintiffs here seek to relitigate a factual question involved in the proceeding before the Commission on which they initially elected not to present evidence. Cost of service has long been recognized as an important element in the reasonableness of any rate. The Supreme Court in *Manufacturers Railroad Company* v. *U. S.*, 246 U. S. 457, at pages 488 and 489, discussed the subject of confiscation and the presenting of evi-

dence on that question before the courts. At Page 489 the court said:

> "Nevertheless, correct practice requires that, *in ordinary cases* (italics ours), and where the opportunity is open, all the pertinent evidence shall be submitted in the first instance to the Commission, and that a suit to set aside or annul its order shall be resorted to only where the Commission acts in disregard of the rights of the parties."

Rate cases such as this suit are among the ordinary cases referred to in the *Manufacturers Railroad* case, supra. The pertinent evidence bearing on the issue of confiscation should have been submitted to the Commission in the initial hearing, but was not. Such testimony will not be received by the District Court in this suit.

The plaintiff's motion to stay and remand is accordingly overruled, and the defendants' motion to dismiss is sustained, and the cause is ordered dismissed.

(S.) SETH THOMAS,
United States Circuit Judge.
(S.) GEO. H. MOORE,
United States District Judge.
(S.) ROY W. HARPER,
United States District Judge.